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The Boeing Company *and* Joanna Gamble. Case 19–CA–089374

August 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On July 26, 2013, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to

[1] On August 21, 2015, the Respondent submitted to the Executive Secretary a document which it described as a "Letter of Supplemental Authority to alert the Board to a recent decision [that further supports its exceptions and its brief in support of its exceptions]", citing *S.W. General, Inc. v. NLRB*, No. 14-1107, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015). In *S.W. General*, the U.S. Court of Appeals for the District of Columbia Circuit held that Acting General Counsel Lafe Solomon was qualified to serve in that capacity under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345, et seq., and that he validly served as the Acting General Counsel at the direction of the President beginning June 21, 2010. The court further held that Solomon's authority as the Acting General Counsel ceased on January 5, 2011, when the President nominated him for the position of the General Counsel.

Contrary to the Respondent's suggestion, *S.W. General* does not address any issue the Respondent previously raised in this matter, by exceptions or otherwise. Accordingly, we reject the Respondent's August 21 letter as an untimely effort to file additional exceptions.

As an initial matter, there is no evidence that the Respondent raised any question regarding the authority of the Acting General Counsel or raised any related challenges during the Region's investigation of the charge in this matter. Nor does the Respondent's answer to the complaint raise any question about the authority of the Acting General Counsel or those who operate in his behalf. Indeed, on June 6, 2013, the Respondent and counsel for the Acting General Counsel filed a Joint Motion and Stipulation of Facts in which they waived a hearing in this matter and authorized the administrative law judge (ALJ) to issue a decision based on the stipulated record. Notably, this joint motion listed only three issues in dispute, none of which related to the authority of the Acting General Counsel or the Region to prosecute this case. See Jt. Mot., pp. 8–9.

On June 7, 2013, the judge issued an order granting the joint motion, approved the stipulation, and directed that briefs should be filed no later than July 11, 2013. On July 11, 2013, the Respondent filed a 20-page brief with the ALJ in which it made a passing reference that "the Complaint is *ultra vires*, and the Board and its agents lack legal authority to prosecute, hear, or decide this matter" (citations omitted). R. Br. on Stip. Rec. at 5–6. In a footnote, the Respondent explained that it was raising a jurisdictional question based upon the argument that the Board lacked a quorum. The Respondent went on to state, again without elaboration,

> [That in the absence of a Board quorum] the appointment of the Regional Director for Region 19 and the issuance of the Complaint in this case are void, the prosecution of this case by counsel for the Acting General Counsel is unlawful, the Administrative Law Judge lacks lawful authority to hear or decide this case, and any decision that may be issued in this case will be void *ab initio.*

R. Br. on Stip. Rec. at 6 fn. 2.

On July 26, 2013, the judge issued a decision in which he rejected the Respondent's jurisdictional argument "that 'the complaint is *ultra vires*' and may not lawfully be processed due to the lack of a valid Board quorum" (citations omitted). JD slip op. at 2 fn. 3. The judge further found that the Respondent violated the Act as alleged in the complaint.

On August 23, 2013, the Respondent filed exceptions to the judge's decision. The Respondent listed 23 separate exceptions (not including subparts), only 1 of which addressed its "jurisdictional argument." Exception 1 reads as follows:

> [To the judge's] Finding that the Complaint in this case is not *ultra vires* and may be lawfully processed notwithstanding the National Labor Relations Board's lack of a valid quorum. Decision at 2 n.3. This finding is actually a conclusion and is contrary to law.

In its brief in support of its exceptions, the Respondent reiterated the "lack of quorum" argument it presented to the judge, citing two additional cases—*NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013); and *Hooks v. Kitsap Tenant Support Services., Inc.,* C13-5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013). The Respondent did not indicate why it cited *Enterprise Leasing*, but it cited *Kitsap* for the proposition that the "Acting General Counsel was not validly appointed," and therefore he "lacked independent authority." The Respondent did not further elaborate on its argument, if any, regarding *Kitsap*. R. Br. in Support of Exceptions at 24–25. The counsel for the General Counsel filed an answering brief in which it addressed the "lack of quorum" argument, and the Respondent filed a reply brief in which it simply stated:

> As a final matter, Boeing submits that the Complaint was ultra vires and the Board's agents lacked legal authority to prosecute, hear, or decide this case. The Acting General Counsel relies on cases that disagree with *Noel Canning v. NLRB,* 705 F.3d 490, 499–514 (D.C. Cir.), *cert. granted,* 133 S. Ct. 2861 (June 24, 2013), and its progeny. These differences will be resolved by the federal courts.

R. Reply Br. at 6.

As demonstrated above, the Respondent did not cite or refer to the FVRA. Nor did it elaborate in any way on its reference to the quote from *Kitsap* that the "Acting General Counsel was not validly appointed," which we note is directly contrary to the rationale of *S.W. General*. Indeed, in its final brief to the Board, the Respondent did not make any reference to *Kitsap*. Thus, we find that the Respondent has waived its right to challenge the authority of the Acting General Counsel to prosecute this case under the rationale of *S.W. General*. Not only did the Respondent fail to raise this argument in its answer or other pleadings, it entered into a stipulation that there were only three issues in dispute, none of which questioned the authority of the Acting General Counsel and those acting on his behalf. Under these circumstances, the Respondent's August 21, 2015 letter, submitted nearly 2 years after the time for filing exceptions, is simply too little too late.

Finally, on August 27, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification which states, in relevant part,

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.

affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

1. Prior to November 2012, the Respondent maintained and routinely distributed to all employees involved in human resources investigations a confidentiality notice that stated, in relevant part:

> Human Resources investigations deal with sensitive information and may be conducted under authorization of the Boeing Law Department. Because of the sensitive nature of such information, you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.
>
> As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the Investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis.
>
> Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, please inform him or her that you have been instructed not to discuss it and refer the individual to the Human Resources representative who is investigating your concern.

The judge found that this broad policy directing employees not to discuss investigations with their coworkers violated Section 8(a)(1). He explained that "such blanket confidentiality directives impermissibly infringe on employees' statutory right to discuss among themselves their terms and conditions of employment and otherwise engage in concerted protected activity."

The Respondent excepts, arguing that requiring confidentiality in all of its investigations was lawful based on legitimate business justifications. According to the Respondent, these justifications include protecting witnesses, victims, or employees under investigation from retaliation or harassment, as well as preventing the spread of unfounded rumors. The Respondent maintains that its blanket confidentiality policy is necessary to ensure the integrity of the investigation and to encourage employees with complaints to come forward.

We agree with the judge that the policy was unlawful. While an employer may legitimately require confidentiality in appropriate circumstances, it must also attempt to minimize the impact of such a policy on protected activity. Thus, an employer may prohibit employee discussion of an investigation only when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights. See *Caesar's Palace*, 336 NLRB 271, 272 (2001). As found by the judge, the Respondent's generalized concern about protecting the integrity of *all* of its investigations was insufficient to justify its sweeping policy. Rather, in weighing the competing interests, the Respondent was obligated to determine whether the particular circumstances of an investigation created legitimate concerns of witness intimidation or harassment, the destruction of evidence, or other misconduct tending to compromise the integrity of the inquiry. See *Banner Estrella*, supra, 362 NLRB No. 137, slip op. at 2–3. The Respondent's blanket approach clearly failed to satisfy this requirement and thus interfered with employees' Section 7 rights.[5] See *Hyundai*

> My action does not reflect an agreement with the appellate court ruling in *S.W. General*. Rather, my ratification authorizes the continued prosecution of this matter and facilitates the timely resolution of the charges that I have found meritorious. Congress expressly exempted "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the authority of the Acting General Counsel under the FVRA, this ratification renders moot any argument that *S.W. General* precludes further litigation in this matter.

[2] In adopting the judge's findings of violations, we do not rely on his citations to *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), and *Fresenius USA Mfg.*, 358 NLRB No. 138 (2012). We rely instead on *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015), and *Fresenius USA Mfg.*, 362 NLRB No. 130 (2015). In addition, we do not rely on *Taylor Made Transportation Services*, 358 NLRB No. 53 (2012).

[3] Even assuming it was timely raised, we find no merit in the Respondent's contention that the Acting General Counsel lacked the authority to prosecute this case because the Board lacked a quorum. *Newark Electric Corp.*, 362 NLRB No. 44, slip op. at 1 fn. 1 (2015). We also reject the Respondent's contention that the appointment of Ronald K. Hooks as Regional Director for Region 19 is invalid. *Longshoremen ILWU Local 4 (Tidewater Barge Lines),* 362 NLRB No. 40, slip op. at 1 fn. 1 (2015).

[4] We shall substitute new notices in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[5] We also adopt the judge's finding that the Respondent unlawfully disciplined Charging Party Joanna Gamble pursuant to this unlawful confidentiality policy. In *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 (2011), the Board clarified that "discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." We agree with the judge that the written warning issued to Gamble was unlawful under both prongs of this test, and that the Respondent failed to adequately repudiate the unlawful warning.

America Shipping Agency, 357 NLRB No. 80, slip op. at 1, 14–15 (2011) (no legitimate and substantial business justification where employer routinely prohibited employees from discussing matters under investigation).

2. Since November 2012, the Respondent has provided a revised confidentiality notice to employee witnesses participating in human resources investigations. This revised notice (with pertinent changes from original notice in italics) states, in relevant part, that:

> Human Resources Generalist investigations deal with sensitive information. Because of the sensitive nature of such information, *we recommend that you refrain from discussing this case* with any Boeing employee other than company representative[s] investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.
>
> As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis.
>
> Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, *we recommend that you inform him or her that Human Resources has requested that you not discuss the case*, and refer the individual to the Human Resources representative who is investigating the matter.

The Respondent asked employee witnesses to sign the revised notice to indicate that the Respondent had advised them of this policy and that they understood it.

As shown, the revised notice is virtually identical to the original notice, substituting "we recommend that you refrain from discussing the case" for "you are directed not to discuss this case" with coworkers. The judge found that the Respondent's routine use of the revised notice, like the prior version, infringed on employee rights in violation of Section 8(a)(1). The judge rejected the Respondent's argument that the substitution of "recommend" for "direct" cured whatever defects existed in the original notice. The judge found that, in context, "recommend" should be treated as equivalent to "request," which the Board has found unlawful. See *Heck's, Inc.,* 293 NLRB 1111, 1114, 1119 (1989) ("company requests you regard your wage as confidential" held violative of 8(a)(1) as restraining employees' Sec. 7 activity). We agree with the judge's findings.

The Board has long held that the determination whether a rule is unlawful "is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993). As discussed by the judge, the Board has found similar requests for compliance with employer directives to violate the Act because of their reasonable tendency to inhibit protected activity. See id. (rule unlawfully stated that "[y]our salary is determined individually, is confidential, and shouldn't be discussed with anyone other than your supervisor or the Personnel Department"); *Heck's, Inc.*, supra at 1119 (finding unlawful rule that "company requests you regard your wage as confidential and do not discuss your salary arrangements with any other Employee"). In addition, in finding that the revised confidentiality notice would likewise reasonably tend to inhibit Section 7 activity, the judge properly relied on the notice's clear communication of the Respondent's desire for confidentiality, the Respondent's routine requests that employees sign the notice, and the lack of any assurance in the notice that employees were free to disregard the Respondent's recommendation that they refrain from discussing the matter under investigation. In these circumstances, the Respondent is not stating only a mere "preference" for confidentiality, as maintained by our dissenting colleague. Employees have a Section 7 right to discuss employer investigations with their coworkers. See, e.g., *Inova Health System*, 360 NLRB No. 135, slip op. at 6–7 (2014). By infringing on that right, the revised notice shares the flaws of the original version and is also unlawful.

Our dissenting colleague contends that the Respondent's use of the term "recommend" is not equivalent to the unlawful use of "shouldn't" in *Radisson Plaza* or "request" in *Heck's*. We find his contention unpersuasive. First, the generally accepted definition of "recommend" is "to advise."[6] See, e.g., *Merriam-Webster's*

In finding the confidentiality policy unlawful, Member Johnson does not rely on *Banner Estrella Medical Center*, 362 NLRB No. 137, or *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011). Member Johnson agrees that the Respondent's postinvestigation discipline of Gamble was unlawful because the Respondent was aware of her protected conduct. He also agrees that the Respondent's repudiation was not adequate, but only because it was not unambiguous.

[6] We reject our colleague's suggestion that in finding the revised notice unlawful, we are "distort[ing] the ordinary meaning" of "recommend," "request," and "advise." We construe such words as an employee would—within the full context of the revised notice. That context includes the fact that when an employer "recommends," "requests," or "advises" that its employee act or refrain from acting in

Collegiate Dictionary (10th ed. 1999). Thus, there is not a material difference between the use of "recommend" here and the language at issue in the above cases. Further, the Respondent itself treats "recommend" as synonymous with "request" in the revised notice when stating "we recommend that you inform [inquiring persons] that Human Resources has *requested* that you not discuss the case" (emphasis added). Finally, as found by the judge, employees would not feel free to disregard the Respondent's "recommendation" where, as here, it is part of a formal policy, reinforced by the requirement that employees sign the notice.[7]

Our colleague also emphasizes the Respondent's purportedly legitimate confidentiality interests as a basis for finding the revised notice to be lawful. But as with the original notice, the Respondent has not demonstrated the existence of a legitimate and substantial business justification for this rule. In order to do so, it must be shown that "witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up. Only if the Respondent determines that such a corruption of its investigation would likely occur without confidentiality is the Respondent then free to prohibit its employees from discussing these matters among themselves." *Hyundai America Shipping Agency*, supra, 357 NLRB No. 80, slip op. at 15.[8] The Respondent made no such assessment, sweeping all investigations under its revised notice. See id. (where employer failed to conduct any preliminary analysis of need for confidentiality, rule against employees discussing matters under investigation was overbroad). For that reason, the revised notice impermissibly infringed on employees' Section 7 rights.

Finally, our colleague's reliance on Section 8(c) is also unavailing. Typically, Section 8(c) applies to noncoercive expressions of views about union representation in general or a specific union, as well as related labor controversies. See *NLRB v. Gissel Packing*, supra at 618 (Under Sec. 8(c), "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'").[9] No such issue is presented here.[10] Moreover, Section 8(c) cannot ever be relied on to adopt rules that would reasonably tend to interfere with the exercise of employees' Section 7 rights.

For all these reasons, we adopt the judge's finding that the Respondent's use of the revised confidentiality notice violated Section 8(a)(1) as alleged.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Boeing Company, Ren-

some manner, the employee could reasonably construe the communication as carrying the potential for retaliation that would not exist in other relationships. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."). This is not to say, as our colleague suggests we do, that an employer's request always implicates an employee's economic dependence and an inherent potential for adverse consequences. The absence of such conditions, however, requires a showing of circumstances not present in this case.

[7] Our colleague also contends that in *Radisson Plaza Minneapolis*, supra, the Board purportedly focused on an illustration of a paycheck emblazoned with the words "TOP SECRET" alongside the rule in question as the basis for finding it to be unlawful. We disagree. The Board there primarily found that the rule's "advisory" phrasing that employees not share wage information had the same unlawful effect as a "requirement." Id. at 94 fn. 2. The paycheck illustration was clearly a secondary ground for finding the rule to be unlawful. Id. In applying this precedent, we construe the Board's holding as the most reliable indicator of its reasoning. Unlike our colleague, we do not subscribe to a contrary interpretation of that case based on the asserted "intimate proximity of the rule and the paycheck illustration" in the Board's recitation of facts.

Our colleague further claims that *Heck's*, supra, is distinguishable because the rule in that case conjoined "request" with the imperative "do not discuss." Our colleague misreads that decision, as the Board's analysis simply presented the issue as a request not to discuss, and found it to be an unlawful prohibition. *Heck's*, supra at 1119. More importantly, however, there simply is no meaningful difference between the request not to discuss in *Heck's* and the Respondent's recommendation here to "refrain from discussing" and to tell other employees that they have been requested not to discuss the matter.

[8] For the reasons stated in our decision in *Banner Estrella Medical Center*, supra, 362 NLRB No. 137, we disagree with our dissenting colleague's criticism of the *Hyundai* standard, as well as his contention that the standard is not applicable to the Respondent's confidentiality directive here.

[9] See also *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966) ("the enactment of [Sec.] 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management"); *Flying Foods*, 345 NLRB 101, 105 (2005) ("Section 8(c) of the Act explicitly recognizes the Respondent's right to express its views about labor issues and unionization, provided it does so in noncoercive terms"), enfd. 471 F.3d 178 (D.C. Cir. 2006); and *Wild Oats Community Markets*, 336 NLRB 179, 182 (2001) ("the legislative history of the Taft-Hartley amendments indicates that Section 8(c) was enacted for the principal purpose of protecting employers' rights to express their *views or opinions* regarding unions and union organization to their *employees*" (original emphasis)).

[10] We do not, as our dissenting colleague claims, find that Sec. 8(c) may not apply to allegations of Sec. 8(a)(1) misconduct. In line with longstanding Supreme Court and Board precedent, we simply find that it does not apply to the revised notice.

ton, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 27, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

I agree that the Respondent's original confidentiality notice directing all employees involved in human resources investigations not to discuss the investigation with their coworkers was unlawfully overbroad.[1] Unlike my colleagues, however, I find that the revised confidentiality notice, which only "recommends" that employees refrain from discussion, was lawful.[2]

The revised notice, which all employee participants in investigations must sign, states:

> Human Resources Generalist investigations deal with sensitive information. Because of the sensitive nature of such information, we recommend that you refrain from discussing this case with any Boeing employee other than company representative[s] investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.
>
> As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis.
>
> Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, we recommend that you inform him or her that Human Resources has requested that you not discuss the case, and refer the individual to the Human Resources representative who is investigating the matter.

Fairly read, the revised notice would not reasonably be understood by employees as interfering with their Section 7 rights to discuss information regarding investigations with others. It only recommends that employees refrain from doing so, based on the lawfully expressed employer interest in protecting the integrity of those investigations. There is no mandate to refrain, either express or implicit; neither is there any suggestion that discipline could result from failing to follow the recommended course of action. Employees are advised of the reasons why the Respondent believes they should not discuss matters under investigation, but the choice of accepting or ignoring this advice is left to them.

In reaching the contrary conclusion, my colleagues seem to contend that an employer's use of the word "recommend," standing alone, would reasonably be viewed by employees as a mandatory direction. In their view, it makes no difference whether an employer "recommends," "advises," or "requests" an employee to maintain the confidentiality of an investigation. But that distorts the ordinary meaning of these words, which are clearly not synonymous with words such as "direct," "order," or "mandate." In the abstract, they are merely hortatory in inviting voluntary compliance with a course of action favored by the employer.[3]

I do agree with my colleagues that the meaning of "recommend" and similar words can vary in context. In

[1] I also join my colleagues in rejecting the Respondent's belated challenge to the former Acting General Counsel's authority to issue and prosecute the complaint, a challenge that has in any event been mooted by the present, validly appointed and confirmed the General Counsel's ratification of the complaint and its continued prosecution.

[2] I disagree with my colleagues' reliance on *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011), and *Banner Estrella Medical Center,* 362 NLRB No. 137 (2015), in finding the revised confidentiality notice unlawful. In *Banner Estrella*, a panel majority found unlawful an employer's "request" that an employee refrain from repeating what was discussed during an investigative meeting based on what the *Banner Estrella* majority described as the standard applied in *Hyundai*. The majority here has erroneously applied that "standard." Member Miscimarra dissented in *Banner Estrella*. *Banner Estrella*, supra, slip op. at 7. I agree, for the reasons stated in his dissent, that the so-called *Hyundai* standard is impractical, improper, and fails to fairly balance employees' Sec. 7 interests and employers' interests in being able to conduct essential investigations in the workplace confidentially. I particularly disagree with the application of the standard in *the preliminary stages* of any investigation where an employer will likely have *little to no knowledge of the underlying facts upon which the standard turns*, i.e.: whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a coverup. However, where there is a blanket command set forth, ostensibly covering all time periods and all situations, that prohibits employees from discussing anything about a "case" under investigation, that is too broad a directive to comport with Sec. 7 rights. Thus, I find the violation in regard to the original notice.

[3] It is possible for an employer to ask an employee to do something without the employee construing the communication as carrying the potential for retaliation simply because of the employee's economic dependence. There is, for instance, a well-established conceptual difference between mandatory overtime and voluntary overtime.

fact, that is precisely why I find that neither of the two Board decisions[4] they and the judge rely on support giving recommend a mandatory connotation in this case. First, the employers in those cases did not even attempt to offer a legitimate explanation for telling employees that discussion of their wages was confidential. Second, even if the attempt were made, the Board has never recognized that there can be a legitimate reason for treating wage discussions as confidential. By contrast, even my colleagues in the majority have recognized that there are specific circumstances in which employers can legitimately treat investigation matters as confidential.

Finally, the rule in each of the cited cases contains language providing a mandatory context that does not exist in the Respondent's revised policy. In *Radisson Plaza*, the employer's rule stated that: "Your salary is determined individually, is confidential, and *shouldn't be discussed* with anyone other than your supervisor or the Personnel Department." 307 NLRB 94 (emphasis added). On its face, I find that a reasonable employee would view "shouldn't" as obviously distinguishable from "recommend" in determining whether compliance was optional, but in this instance the rule was "accompanied by an illustration of a paycheck with the words "TOP SECRET" emblazoned across it . . . ."[5] Id. In that context, the Board understandably reasoned any arguable distinction between a rule that "requires" and one that "advises" employees not discuss wages *"certainly is obliterated by the Respondent's use of a graphic that boldly indicates that the contents of an employee's pay envelope are 'top secret.'"* Id. at 94 fn. 2 (emphasis added).

Similarly, in *Heck's,* the employer's rule stated that: "The wage paid each Employee is considered confidential information. Therefore your company *requests* you regard your wage as confidential and *do not discuss* your salary arrangements with any other Employee." Id. at 1119 (emphasis added). The rule thus conjoined a "*request*" with an imperative "*do not discuss*."

In both cases then, although the employers' rules may have been partially couched in arguably precatory terms, when read in appropriate context the rules would reasonably tend to interfere with any discussion of wages by employees and thus would tend to unlawfully inhibit employee Section 7 activity. The mere "recommendation" of employee behavior in this case lacks such context. The Respondent's revised policy contains no wording suggesting that the Respondent's "recommendation" that employees refrain from discussing an investigation is anything else. Yet my colleagues and the judge find that the revised notice's "clear communication of the Respondent's *desire* for confidentiality" still makes it a mandatory directive absent assurances to the contrary in the notice. In other words, it is apparently not enough for an employer to recommend, that in light of legitimate confidentiality concerns, that employees not discuss matters under investigation. It must also vitiate the recommendation by expressly stating "feel free to do as you wish."

The original notice told employee witnesses in every investigation that they were "directed" and "instructed" not to discuss the case. The overly broad application of that language to every investigation was contrary to Board precedent holding that blanket confidentiality directives impermissibly infringe on employees' statutory rights. The revised notice twice substitutes for the prior flat prohibition, equally plain, precatory language that "recommend[s] that you refrain from discussing" and that, if asked to discuss the case, "recommend[s] . . . inform[ing] [the inquirer] . . . that [the Respondent] has requested that [the employee] not discuss the case . . . ." These revisions quite clearly communicate that the Respondent is merely expressing its preference, rather than mandating confidentiality. The revised language also clearly communicates the Respondent's legitimate reasons for the recommendation and preference. It cannot be seriously disputed that human resources investigations may deal with "sensitive information" about employees and that legitimate concerns exist about the effects on the investigatory process if such information is not kept confidential.

In sum, absent any express or implicit basis for deeming the revised policy to be a mandatory direction, it is an expression of opinion as to whether employees should engage in the protected activity of discussing with others matters that are under investigation. The Respondent's right to communicate this legitimate desire for confidentiality in noncoercive terms on this subject is expressly protected by Section 8(c) of the Act, which assures the right of an employer to express "'any views, argument, or opinion' in any media form without committing an unfair labor practice" so long as an employer's communications contain no threat of reprisal or promise of benefit. *NLRB v. Pratt & Whitney Air Craft Div., United Technologies Corp.*, 789 F.2d 121, 134 (2d Cir. 1986) (citation omitted) (employer has 8(c) right to communicate with employees about negotiations). The revised

[4] *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993), and *Heck's, Inc.,* 293 NLRB 1111 (1989).

[5] Although my colleagues wish to down play the paycheck illustration's interpretative significance, its contextual importance to the Board's determination is apparent from the Board's noting at the outset of its analysis the intimate proximity of the rule and the paycheck illustration.

notice clearly expresses only the Respondent's preference without any threat of reprisal or promise of benefit.

While I certainly agree with my colleagues that Section 8(c) was intended to protect an employer's noncoercive expression of views about employees' union organizational activity, it is not limited to only such statements. Obviously, Section 8(c) applies to "unfair labor practices" by its plain text, and the Board has applied it as such, as *Pratt & Whitney*, supra, itself demonstrates. "Section 8(c) explicitly recognizes that not all displeased communications from an employer to an employee are coercive . . . ." [so] "to violate Section 8(a)(1), a statement must contain a threat of reprisal or force or promise of benefit." *Greater Omaha Packing Co., Inc. v. NLRB*, 790 F.3d 816, 822–823 (8th Cir. 2015) (supervisor's asking employee "what it is [he] wanted" just before employee's unlawful firing did not itself violate Sec. 8(a)(1) as it did not coerce the employee and was protected by Sec. 8(c)). As I don't believe a recommendation is really a threat in disguise, I fault my colleagues for essentially reading Section 8(c) out of the statute when it comes to Section 8(a)(1). The courts have instructed us, at the very least, to thoughtfully grapple with those sections of the Act that might conflict in a particular case, and my colleagues have come nowhere close to doing so here. See *Children's Hospital & Research Center of Oakland, Inc. v. NLRB*, 793 F.3d 56 (D.C. Cir. 2015) (remanding case to Board for mishandling "[t]he interplay of [S]ection 8(a)(5) and [S]ection 9(a)" by failing "to wrestle with [those] relevant statutory provisions" in determining the case outcome).

Contrary to my colleagues, the Respondent's revised notice cannot be reasonably construed as coercive because it clearly communicates the "Company's desire for confidentiality" nor because, by "asking the employee witnesses to actually sign the revised notices," it clearly communicates that the "confidentiality concerns should be taken seriously." Furthermore, the suggestion that the notice lacks some additional assurance that the "recommendation" may be disregarded is just bootstrapping—requiring acceptance of the unsupported implicit premise that the revised notice is coercive without such assurances. Because the revised notice quite clearly and straightforwardly states the Respondent's undemanding recommendation that employees refrain from discussing the investigation, nothing more is needed.[6] "Common sense sometimes matters in resolving legal disputes," and it should prevail here. See *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93, 93 (D.C. Cir. 2015).

In sum, while the Respondent's original confidentiality notice's blanket prohibition on discussion of the human resources investigations was not lawful, the Respondent has the right to express its opinion about the handling of sensitive information from an investigation and to "recommend" that employees refrain from discussing the investigation. The revised confidentiality notice does nothing more than that. I would therefore reverse the judge and dismiss the complaint allegation on this issue.

Dated, Washington, D.C. August 27, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or routinely distribute or enforce confidentiality directives, requests, and/or recommendations to employees involved in human resources (HR) investigations not to discuss the case with their coworkers.

WE WILL NOT discipline employees for violating such overbroad confidentiality directives, requests, and/or recommendations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, revise or rescind the

[6] My colleagues assert that the Respondent has failed to demonstrate a "legitimate and substantial justification for *this rule*," citing *Hyundai*, supra (emphasis added). As the Respondent is stating only its preference that employees maintain the confidentiality of the investigation, there is no "rule" that the Respondent must justify.

HR investigation confidentiality notices in effect prior to and since November 2012.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, rescind the August 9, 2012 written warning we issued to employee Joanna Gamble for violating the HR investigation confidentiality notice, and WE WILL, within 3 days thereafter, advise her in writing that this has been done and that the warning will not be used against her in any way.

THE BOEING COMPANY

The Board's decision can be found at www.nlrb.gov/case/19-CA-089374 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL NOT maintain or routinely distribute or enforce confidentiality directives, requests, and/or recommendations to employees involved in human resources (HR) investigations not to discuss the case with their coworkers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, revise or rescind the HR investigation confidentiality notices in effect prior to and since November 2012, to the extent we have not already done so.

THE BOEING COMPANY

The Board's decision can be found at www.nlrb.gov/case/19-CA-089374 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

M. Anastasia Hermosillo, Esq., for the Acting General Counsel.
Charles N. Eberhardt, Esq. (Perkins, Coie LLP), for the Respondent Company.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In early August 2012, Boeing disciplined Joanna Gamble, an unrepresented employee at its Renton, Washington facility, for communicating with coworkers about a recently completed human resources (HR) investigation into Gamble's allegations against her supervisor. Boeing asserted that, by doing so, Gamble had violated a confidentiality notice she had signed during the investigation, which specifically "directed" witnesses not to discuss the case with any Boeing employee other than the investigators or the witness' union representative, if applicable.

Gamble responded by filing the instant unfair labor practice charge, alleging that the discipline unlawfully interfered with her statutory right under the National Labor Relations Act (the Act) to discuss the terms and conditions of her employment with her coworkers.[1] About 10 days later, in late September 2012, the Company rescinded the discipline and notified Gamble that it had done so. Effective November 2012, it also re-

[1] Gamble subsequently filed an amended charge on November 16, 2012, alleging that the confidentiality notice itself also violated the Act.

placed its standard confidentiality notice with a revised notice that instead "recommend[ed]" employee witnesses refrain from discussing the case with other employees.

The General Counsel, however, concluded that the revised confidentiality notice was just as objectionable as the original notice under extant law, and that the Company likewise failed to adequately repudiate the unlawful discipline issued to Gamble pursuant to the original notice. Accordingly, on January 29, 2013, the General Counsel issued the instant complaint alleging that all three—the original confidentiality notice, the revised notice, and the discipline to Gamble—violated the Act.

On February 12, the Company filed an answer denying all of the foregoing allegations. Thereafter, on June 6, the General Counsel and the Company jointly moved for a decision in the case without a hearing, based solely on a stipulated record.[2] I granted the joint motion on June 7, and the parties filed their briefs on July 11.

After carefully considering the briefs and the entire stipulated record, for the reasons set forth below I find that the Company violated the Act as alleged.[3]

I. THE ORIGINAL CONFIDENTIALITY NOTICE

In relevant part, the Company's original confidentiality notice stated as follows:

> Human Resources investigations deal with sensitive information and may be conducted under authorization of the Boeing Law Department. Because of the sensitive nature of such information, you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.
>
> As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the Investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis.
>
> Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, please inform him or her that you have been instructed not to discuss it and refer the individual to the Human Resources representative who is investigating your concern.

The Company admits that it routinely gave this confidentiality notice to employee witnesses during HR investigations at most of its facilities prior to November 2012 (Stip. par. 11; and R. Br. 11). The Company also acknowledges that the notice was "effectively a rule of conduct" (Br. 10).

As indicated by the General Counsel, extant Board law is clear that such blanket confidentiality directives impermissibly infringe on employees' statutory right to discuss among themselves their terms and conditions of employment and otherwise engage in concerted protected activity. See *Hyundai America Shipping Agency,* 357 NLRB No. 80 (2011) (employer violated Sec. 8(a)(1) of the Act by routinely instructing employees not to talk to other employees about matters under investigation, without any consideration of whether confidentiality was truly necessary to prevent corruption of the investigation). Accord: *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012). Indeed, the Company concedes that its original confidentiality notice "is difficult to reconcile" with the foregoing Board precedent (R. Br. 9).

Nevertheless, the Company contends that the original notice did not violate the Act, as the foregoing Board precedent is "wrong." Like the employer in *Hyundai*, supra, the Company argues that it "has legitimate interests in keeping every ongoing HR investigation confidential"—"ensuring the integrity of investigations, preventing workplace retaliation for participation in investigations, and fostering an environment where employees will readily report issues"—and that these interests "outweigh any potential employee interest in discussing ongoing HR investigations." (R. Br. 9–11.) Moreover, the Company argues that it is impractical for it to conduct a separate evaluation in each HR investigation to determine whether the Company's need for confidentiality outweighs the employee witness' statutory rights.

The Company's arguments are not without factual or legal support. The parties stipulated that, since September 2011, the Company has conducted over a thousand HR investigations in its Commercial Airplane group (BCA) alone. Further, as indicated by the Company, the Board itself has made similar arguments to support blanket rules in other contexts. See *IBM Corp*., 341 NLRB 1288, 1293 (2004) (citing the need for "discretion and confidentiality" in employer investigations as a basis for denying unrepresented employees a *Weingarten* right to have a coworker representative present during investigatory interviews); and *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 222 (1978) (arguing that the Court should uphold the Board's rule against disclosing confidential witness affidavits until the witness has testified because, inter alia, "a particularized, case by case showing [that prior disclosure would interfere with enforcement proceedings] is neither required nor practical").

However, it makes no difference at this stage how persuasive the arguments for revisiting *Hyundai* may or may not be,[4] as I

[2] See Sec. 102.35(a)(9) of the Board's Rules.

[3] Commerce jurisdiction is admitted and well established by the stipulated record. Although the Company argues that "the complaint is *ultra vires*" and may not lawfully be processed due to the lack of a valid Board quorum (citing, e.g., *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), petition for certiorari granted 133 S.Ct. 2861 (2013)), the Board has rejected similar arguments in numerous other cases. See, e.g., *2 Sisters Food Group*, 359 NLRB No. 158 fn. 1 (2013); and *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013).

[4] The Board's policy in unfair labor practice (ULP) investigations and the Company's policy in HR investigations are not entirely analogous. Thus, although employee witnesses are routinely advised during ULP investigations not to show their pretrial Board affidavits to anyone (see NLRB Casehandling Manual, Part One, Secs. 10060.6 and 10060.9), this does not restrict them from even discussing the ULP investigation with other employees. However, this distinction does not by itself adequately answer the argument that it is just as impractical to

am bound to follow Board precedent unless and until it is reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004). Accordingly, I find that the Company's routine use of the original confidentiality notice to prohibit employee witnesses from discussing ongoing HR investigations with other employees violated Section 8(a)(1) of the Act, as alleged.[5]

II. THE REVISED CONFIDENTIALITY NOTICE

As indicated above, after the unfair labor practice charge in this case was filed, the Company created a revised confidentiality notice. In relevant part, the revised notice states as follows:

> Human Resources Generalist investigations deal with sensitive information. Because of the sensitive nature of such information, we recommend that you refrain from discussing this case with any Boeing employee other than company representative[s] investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.
>
> As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis.
>
> Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, we recommend that you inform him or her that Human Resources has requested that you not discuss the case, and refer the individual to the Human Resources representative who is investigating the matter.

As with the original notice, the Company admits that, since November 2012, it has routinely given the revised notice to employee witnesses during HR investigations at most of its facilities. Indeed, the Company has asked the witnesses to actually sign the notice. (Stip. par. 12.)

The Company argues that, by substituting "recommend" for "directed," the revised confidentiality notice has cured any arguable deficiencies in the original notice (R. Br. 12). The General Counsel, on the other hand, argues that the revised notice is just as unlawful as the original, citing, e.g., *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1992) (handbook statement that employees "shouldn't" discuss their salary with anyone had a reasonable tendency to coerce employees in the exercise of their statutory rights notwithstanding its nonmandatory phrasing).

Again, I find that the General Counsel has the better argument under extant law. First, the revised notice itself suggests that the Company's "recommendation" should be treated as a "request," and the Company concedes that this is an accurate or reasonable interpretation (R. Br. 14–15). Second, like the original notice, the revised notice clearly communicates the Company's desire for confidentiality. Third, by asking the employee witnesses to actually sign the revised notice, the Company has also clearly communicated that its confidentiality concerns should be taken seriously. Finally, contrary to the Company's contention, nothing in the revised notice can reasonably be interpreted as an assurance to employees that they are nevertheless "free" to disregard the Company's recommendation/request and "discuss the case if he or she chooses to do so" (R. Br. 16).[6]

In agreement with the General Counsel, I find that, in these circumstances, like the handbook statement found unlawful in *Radisson*, the revised notice would have a reasonable tendency to chill employees from exercising their statutory rights. See also *Heck's, Inc*., 293 NLRB 1111, 1114, 1119 (1989) (reaching same conclusion with respect to employer's "request" that employees not discuss their salary); *Fresenius USA Mfg.,* 358 NLRB No. 138 fn. 1 and JD. at 22, 40 (2012) (likewise finding a violation under the circumstances even though employer said only that it "would appreciate" and "prefer" the employee not talking about the investigation); and *NLRB v. Koronis Parts, Inc*., 927 F.Supp. 1208 (D. Minn. 1996) (granting Board's request for interim injunction requiring employer to revoke handbook provision that "ask[ed]" employees not to discuss their wages with other employees).

Accordingly, for the reasons previously discussed, I find that the Company's routine use of the revised confidentiality notice in ongoing HR investigations since November 2012 likewise violated Section 8(a)(1) of the Act, as alleged.[7]

III. THE DISCIPLINE ISSUED TO GAMBLE

Gamble has worked for Boeing for over 30 years and is currently a BCA single-aisle process technical integrator (PTI) at the Company's Renton, Washington facility. In May 2012, she complained to the Company about certain "unacceptable behavior" by her male supervisor (Carroll) and another, nonmanagement male worker (Muller) on the single-aisle

conduct confidentiality evaluations in each HR investigation as it is to do so in each ULP investigation.

[5] It is not entirely clear that the confidentiality notice applied only to ongoing investigations, or that employees, investigators, and managers understood this. Indeed, as discussed below, the circumstances surrounding the discipline issued to Gamble indicate the opposite. However, as noted by the Company, the complaint does not allege that the confidentiality notice was unlawful because it applied even after investigations were completed. Accordingly, I have not addressed that issue; rather, consistent with the complaint allegations, I find that the notice was unlawful under current Board law even assuming it applied only to ongoing investigations.

[6] For example, I reject the Company's argument that the fourth and last paragraph of the notice, which states that the Company "prohibits retaliation against any individual who makes a complaint or participates in an investigation," makes clear that employee witnesses are free to discuss the investigation with other employees. I also reject the Company's contention that the second sentence of the second paragraph can reasonably be read as assuring employee witnesses that they may disclose information about the case on a need to know basis. In context, the sentence clearly refers to the investigator disclosing information on a need to know basis, not the employee witnesses doing so.

[7] In any event, even assuming the revised notice is not unlawful, I would find that it was insufficient by itself to repudiate the Company's unlawful routine use of the original notice. See *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85, slip op. at 16 (2011), enfd. mem. 468 Fed.Appx. 1 (D.C. Cir. 2012), and the discussion infra regarding the Company's rescission of the discipline issued to Gamble.

team.[8] Among other things, Gamble alleged that Carroll and Muller had made negative comments during single-aisle PTI meetings about their female counterparts on the twin-aisle team, employees Ingraham and Stroscheim and their female manager, Rainbow; that Carroll had referred to the mostly-female PTI meeting as a "bitch" session; and that Carroll had also used the word "bitch" when referring to Stroscheim and Rainbow, who he said reminded him of his ex-wife. Gamble stated that she and another female employee on the single-aisle team (Foote) had addressed this with both Carroll and Muller and "taken it up through other venues," but the behavior had escalated and she and Foote were told they would be replaced by younger workers and were instructed to work through their lunchbreaks. Gamble set forth the foregoing allegations and complaints in an email, which she addressed to numerous company managers and executives, and copied (cc'd) to Ingraham, Stroscheim, Rainbow, and Foote.

In response to Gamble's email, the following month the Company conducted an HR investigation into three specific allegations: (1) that in November 2011 Carroll had referred to a meeting as a "bitch session" and used the word "bitch" when referring to a meeting; (2) that in February 2012 Carroll had raised his voice at Gamble when he questioned her about her lunch period; and (3) that Muller had bullied Gamble and made negative comments about coworkers. As part of this investigation, the HR investigator (Sanchez) interviewed several witnesses, including Gamble, Foote, and Carroll himself. However, Sanchez did not interview Ingraham, Stroscheim, or Rainbow, assertedly because they had not observed the three discrete allegations being investigated.[9]

Sanchez completed her HR investigation report to management on July 2, 2012. The report concluded that the three subject allegations were "not substantiated" by the investigation. Sanchez informed Gamble of this conclusion the following day, July 3. She also acknowledged to Gamble that Ingraham, Stroscheim, and Rainbow had not been interviewed as part of the investigation.

Later the same day, Gamble sent two emails to all three women, as well as Foote. Gamble expressed disappointment with the limited scope and outcome of the investigation, and particularly the fact that Sanchez had not interviewed them about corroborating behavior or actions by Carroll. Gamble urged them to inquire why they were not contacted by Sanchez, and to stand together and hold the Company accountable for Carroll's behavior.

Several days later, on July 9, one of the women, Stroscheim, sent an email to Sanchez. The email—entitled "Case closed regarding [] Carroll?"—indicated that Gamble had spoken to her and that she (Stroscheim) was "very disappointed" to learn that the case was closed with "no findings" without her being interviewed.

Two days later, on July 11, Sanchez sent an email Gamble. The email reminded Gamble that she had signed a confidentiality notice during the investigation; advised Gamble that the Company had received information that the notice may have been breached; "directed" Gamble "not to discuss the investigation with any other Boeing employee"; and advised that "[a] breach of the Notice or the sharing of confidential and/or sensitive information could lead to investigation and disciplinary action."

Gamble replied to Sanchez by email later the same day. She admitted that Sanchez was "partially correct"; that she "did breach the confidentiality agreement in part." Gamble stated that she did so because Boeing had "breached their commitment" to her by encouraging employees to come forward but then conducting only a partial investigation and failing to interview employees she had identified for corroboration.

Sanchez reported Gamble's reply, and the Company thereafter had another HR investigator (Granbois) take a statement from Gamble about the matter. Gamble at that time again acknowledged that she had breached the confidentiality notice, after Sanchez told her that the investigation was concluded, by advising the women named in her complaint that they would not be interviewed by Sanchez.

On August 3, 2012, Granbois issued his report. The report was based solely on Stroscheim's email to Sanchez, and Gamble's subsequent email and statement. Gamble's previous, postinvestigation emails to Stroscheim, Ingraham, Rainbow, and Foote were not themselves considered, apparently because they were never provided to Granbois. The report concluded that Gamble had "breached her investigation confidentiality agreement . . . following the conclusion of the investigation . . . by informing other individuals outside of the investigation of the investigation and its outcome."

Several days later, on August 9, the Company issued a written warning to Gamble. The warning stated that it had been determined that Gamble had "failed to comply" with the confidentiality notice by "discuss[ing] the investigation with others," and that future violations could result in further corrective action, including discharge.

However, the Company rescinded the warning approximately 7 weeks later, on September 28, after Gamble filed her September 17 unfair labor practice charge. The Company notified Gamble of this by letter dated the following day, October 1. The letter stated:

> Recently the National Labor Relations Board ruled [in *Banner Estrella Medical Center*, above] that an employer cannot prohibit employees from discussing on-going employer investigations other than in specific, individualized circumstances. We were unaware of this ruling at the time of your Corrective Action for "Failure to Comply with the Notice of Confidentiality and Prohibition against Retaliation." Accordingly, we have rescinded this corrective action from your record.

Nevertheless, the Company contends in the instant proceeding that the warning was actually entirely lawful. First, as discussed above, it contends that the Board's ruling in *Banner* was wrong. Second, it contends that the only conduct the Company was aware of and disciplined Gamble for (notifying other em-

[8] The record indicates that both Carroll and Muller have also worked for Boeing for over 30 years.

[9] Sanchez did not interview Muller because Gamble's allegations regarding him were considered insufficiently specific to warrant an interview.

ployees that the investigation had closed with "no findings" and that they would not be interviewed) did not itself seek or encourage the employees to take any group action, and therefore did not constitute concerted protected activity. Finally, the Company alternatively argues that it promptly and effectively cured any violation by voluntarily rescinding the warning and notifying Gamble that the Company had done so within several days after the matter came to the attention of the Company's legal department. The Company argues that no further action was necessary as there is no evidence that any other employees were aware of the warning, and the Company replaced the original confidentiality notice with the revised notice.

I reject all of the Company's arguments. As discussed above, I am bound to follow Board precedent, and the Company's original confidentiality notice was clearly unlawful under both *Banner* and the Board's 2011 decision in *Hyundai*. Further, as indicated by the General Counsel, Board precedent also holds that disciplining an employee pursuant to an unlawfully overbroad rule is likewise unlawful, even if the employee's conduct was not concerted, if the conduct is of a type that implicates concerns underlying the Act, and the discipline could therefore chill employees from exercising similar conduct that constitutes concerted protected activity. See *Continental Group, Inc*., 357 NLRB No. 39 (2011) (distinguishing, for example, an employee seeking higher wages from an employee sleeping on the job). Accord: *Taylor Made Transportation Services,* 358 NLRB No. 53 (2012).

Gamble's conduct here clearly qualifies as this type of conduct, and the Company does not contend otherwise. Nor does the Company contend that Gamble's postinvestigation communication to her four coworkers actually interfered with the investigation and that this was the reason for the discipline. See id. (employer can avoid liability for the discipline if it can establish that the employee's conduct actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline). The Company concedes, consistent with the warning itself, that Gamble was disciplined simply for violating the rule (R. Br. 18). In any event, given that the investigation was over, and that Carroll, the subject supervisor, already knew about it, the circumstances here clearly do not support such a defense. Cf. *Fresenius,* above, 358 NLRB No. 138, slip op. at 40; and *Mobile Oil Exploration & Producing, U.S., Inc.,* 325 NLRB 176, 178–179 (1997), enfd. 200 F.3d 230 (5th Cir. 1999).

Moreover, in agreement with the General Counsel, I find that a preponderance of the evidence establishes that the Company was, in fact, sufficiently aware of the concerted nature of Gamble's admitted postinvestigation communi-cations. Although the Company never saw Gamble's postinvestigation emails to her four coworkers, Gamble had openly copied all four on her original email to the Company that precipitated the investigation regarding Carroll's and Muller's alleged conduct. Further, Gamble specifically identified all four in that email as fellow victims of the alleged conduct, and stated that one (Foote) had already joined with her in addressing the matter directly with Carroll and Muller and "through other venues." Moreover, if there was any doubt about whether any of the four supported Gamble's complaints, it was clearly erased by Stroscheim's July 9 email to Sanchez expressing disappointment with the investigation and its outcome. Cf. *Reynolds Electric, Inc.*, 342 NLRB 156 (2004) (finding that employer did not have the requisite knowledge of the concerted nature of employee's inquires where he was the only one who made the inquiries, and the employer only knew that he previously had "informational" conversations with other employees about the matter).

Finally, I also agree with the General Counsel that the Company failed to adequately repudiate the unlawful warning. For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, adequately publicized to the employees involved, not followed by other proscribed conduct, and accompanied by assurances to employees that the employer will not interfere with the exercise of their statutory rights. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See also *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003), and cases cited there. Here, regardless of when its legal department learned of the discipline, the fact remains that the Company did not rescind the warning until 7 weeks after it was issued and over a week after Gamble filed her unfair labor practice charge. Cf. *Passavant*, 237 NLRB at 139 (citing similar circumstances in finding employer's repudiation untimely). Moreover, as discussed above, the Company has continued to routinely require employee witnesses in HR investigations to sign a revised confidentiality notice that is just as unlawful as the original under prevailing Board law. Finally, the Company never provided assurances that it would not interfere with employee statutory rights in the future.

CONCLUSIONS OF LAW

1. By maintaining and routinely distributing confidentiality notices that direct, request, and/or recommend to employees involved in HR investigations not to discuss the case with their coworkers, the Respondent Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By disciplining employee Joanna Gamble on August 9, 2012 for violating the confidentiality notice, the Respondent Company has likewise engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the violations found is an order requiring the Respondent Company to cease and desist and take certain affirmative action. Given the Company's admission that its confidentiality notices have been routinely used during HR investigations at most of its facilities nationwide, as requested by the General Counsel the required affirmative remedial action properly includes posting a notice to employees regarding the unlawful confidentiality notices at all of those facilities. Contrary to the Company's contention, such a general posting remedy is appropriate even though only those employees involved in the investigations were given and/or asked to sign the confidentiality notices. See *Banner*, 358 NLRB No. 93, slip op. at 2 & fn. 2. Indeed, considering the large number of HR investigations conducted by the Company, a general

posting remedy would likely be substantially less burdensome, for both the Company and the Board's compliance officer, than a remedy that required identifying and separately notifying each employee who was actually given and/or asked to sign the confidentiality notices.

Accordingly, based on the foregoing findings of fact and conclusions of law, and the entire record, I issue the following recommended[10]

ORDER

The Respondent, The Boeing Company, Renton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and routinely distributing or enforcing confidentiality directives, requests, and/or recommendations to employees involved in HR investigations not to discuss the case with their coworkers.

(b) Disciplining employees for violating such overbroad confidentiality directives, requests, and/or recommendations.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, to the extent it has not already done so, revise or rescind the HR investigation confidentiality notices in effect immediately prior to and since November 2012.

(b) Within 14 days of the Board's Order, to the extent it has not already done so, rescind the unlawful August 9, 2012 written warning it issued to employee Joanna Gamble for violating the HR investigation confidentiality notice, and within 3 days thereafter, advise her in writing that this has been done and that the warning will not be used against her in any way.

(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at its Renton, Washington facility, and the attached notice marked "Appendix B" at all of its facilities nationwide where its confidentiality notices have been used since March 17, 2012."[11] Copies of the notices, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities where posting is required, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed at those facilities at any time since March 17, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 26, 2013

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or routinely distribute or enforce confidentiality directives, requests, and/or recommendations to employees involved in human resources (HR) investigations not to discuss the case with their coworkers.

WE WILL NOT discipline employees for violating such overbroad confidentiality directives, requests, and/or recommendations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, revise or rescind the HR investigation confidentiality notices in effect prior to and since November 2012.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, rescind the August 9, 2012 written warning we issued to employee Joanna Gamble for violating the HR investigation confidentiality notice, and WE WILL, within 3 days thereafter, advise her in writing that this has been done and that the warning will not be used against her in any way.

THE BOEING COMPANY

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or routinely distribute or enforce confidentiality directives, requests, and/or recommendations to employees involved in human resources (HR) investigations not to discuss the case with their coworkers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, revise or rescind the HR investigation confidentiality notices in effect prior to and since November 2012, to the extent we have not already done so.

THE BOEING COMPANY